IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4859 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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SURESHBHAI BALABHAI PARMAR

Versus

DISTRICT MAGISTRATE

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Appearance:

1. Special Civil Application No. 4859 of 2002

MS DR KACHHAVAH for Petitioner No. 1

MR KAMLESH KACHHAVAH for Petitioner No. 1

MR AY KOGJE, AGP for Respondent No. 1-3

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CORAM : MR.JUSTICE C.K.BUCH

Date of decision: 30/07/2002

ORAL JUDGEMENT

1. By this petition under Article 226 of the Constitution of India, the petitioner- detenu has challenged the legality and validity of the order of

detention dated 21.3.2002 passed against him by the District Magistrate, Bhavnagar, in exercise of the powers conferred on him by Section 3(2) of The Gujarat Prevention of Anti-Social Activities Act, 1985 (hereinafter referred to as the PASA Act). The petitioner has been branded as "dangerous person" within the meaning of Sect.2(c) of the PASA Act.

2. The petitioner has been branded as a "dangerous person" and for recording subjective satisfaction to detain the petitioner, the detaining authority has considered registration of three different criminal offences mentioned in the table supplied to the detenu with the grounds of detention which is at page 19 and so also the statements of two independent witnesses recorded on 10.2.2002. All the three criminal cases are registered with Bhavnagar "A" Division Police Station. The first offence was registered on 19.11.2000 and the petitioner was arrested on 22.1.2001. The second offence was registered on 10.5.2001 and he was arrested on 17.5.2001 and the third and last offence was registered on 9.1.2002 and the petitioner was arrested on 10.1.2002 i.e. on the next day of the offence. In all the three cases, the petitioner has been chargesheeted for various offences punishable under Indian Penal Code. He is facing prosecution mainly for the offence punishable under Sections 392, 452, 384, 324 of IPC and under Section 135 of the Bombay Police Act.

3. The Court is not supposed to evaluate the merits of the statements of the secret witnesses, but the plain reading of the statements gives an impression that the statements are vague in nature and the witnesses have not even disclose the exact date on which they had faced harassment or ill-treatment or threat by the petitioner.

4. The petitioner has challenged the legality and validity of the order of detention on number of grounds. However, the ld. counsel appearing for the petitioner Ms. Draupadi Kachhavah has concentrated and restricted her arguments mainly on two grounds. The first point advanced by ld. counsel Ms. Kachhavah is that this Court should consider the gap between three different offences and none of these offences can be said to be in proximity with each other. Even for the sake of arguments it is accepted that the petitioner is found involved in all the aforesaid three cases and is responsible for the same, even than this wrong can be said to be prejudicial to the maintenance of "law and order" and not prejudicial to the "public order". It is further submitted that there is a sharp distinction between maintenance of "public order" and "law and order"

and he ought not to have been branded as "dangerous person" within the meaning of Sec.2(c) of the PASA Act. These three offences collectively or any offence individually cannot be equated with an activity detrimental to "public order". Ld. counsel has tried to point out certain aspects which need consideration while dealing with this issue being very important and relevant.

5. I have considered the submissions of ld. AGP Mr. A.Y. Kogje for the State. However, in view of the ratio of the decision of this Court in the case of Ashokbhai Jivraj @ Jivabhai Solanki v/s Police Commissioner, Surat & Ors., reported in 2000(1) GLR P.816, the say of the ld. counsel for the petitioner shall have to be accepted. In the cited case, the detenu Ashok Jivraj was found involved in four different criminal cases and all these cases were offences against the body of a person. There were statements of independent witnesses against the detenu. By referring the decision of Mustakmiya Jabbarmiya Shaikh v/s M.M. Mehta, Commissioner of Police & Ors., reported in 1995(2) GLR 1268 (SC) and the ratio of the decision of Arun Ghosh v/s State of West Bengal, reported in 1970(1) SCC P.98, it has been observed that the stray incidents would not affect the public order and the order of detention cannot be passed in such cases. In the cited decision, this Court has also observed that "looking to the incident, the case falls under the maintenance of law and order and not the public order". On facts, when court reaches to a conclusion that the case falls under the maintenance of law and order and not the public order, the subjective satisfaction arrived at by the detaining authority does not remain valid. Unless it is found that the case falls in the category of the activities adversely affecting the public order, the detaining authority has no jurisdiction to pass the order of detention. The order of detention under challenge, therefore, cannot sustain.

6. The next point advanced by ld. counsel Ms. Kachhavah for the petitioner is that the detaining authority has wrongly claimed privilege under Section 9(2) of the PASA Act because none of these two secret witnesses have expressed a specific apprehension of danger to their person or property and have requested to keep their names secret on that count. For this, ld. counsel Ms. Kachhavah has placed reliance on the decision of the Division Bench of this Court in the case of Kajalben G.Sindhi v/s Commissioner of Police, Ahmedabad & Others, 2000(2) GLR 1296. The Division Bench, in the case of Kajalben (Supra), after referring to the decision in the case of Bai Amina v/s State of

Gujarat, 1981 GLR 1186 which came to be confirmed by the Full Bench of this Court in Chandrakant N.Patel v/s State, 1994(1) GLR 761, has observed in para-12 as under:-

" In the instant case, not only there is nothing in the contemporaneous record with regard to formation of such opinion or satisfaction regarding withholding of names and material particulars by the detaining authority, but nothing is stated in the grounds of detention. On the contrary, in the affidavit-in-reply, in para-10, the detaining authority has stated that he was subjectively satisfied that if names and addresses and other particulars of the witnesses were disclosed to the detenu, their lives and properties would be in danger. It was further stated that the witnesses were not coming forward to register any complaint because of fear and apprehension of insecurity to their lives and properties. Looking to the record, it appears that it was not stated by the witnesses themselves that there would be damage to their properties. It is also not stated by the detaining authority in the order or even in the grounds of detention and that ground was probably stated for the first time in the affidavit-in-reply."

7. Ratio of this decision squarely applies to the facts of the present case. In the facts and circumstances of the case, the detaining authority has not properly and genuinely exercised the claim of privilege under Sec.9(2) of the PASA Act and that improper exercise of claim of privilege goes to the root of the legality and validity of the order of detention because it prevents the detenu from making effective representation against the order/grounds of detention. Hence, the improper exercise of claim of privilege under Sec.9(2) of the PASA Act has resulted into violation of the right of the detenu flowing from Article 22(5) of the Constitution of India. On this ground, therefore, the impugned order of detention also cannot sustain.

8. I agree that there is an element peeping from the record available that petitioner might be absconding after committing the offence registered against him in the year 2000 & 2001, but when the detaining authority has not taken steps immediately after alleged conduct of the petitioner, the act of exercise of powers vested under Section 3(2) of the PASA Act after a long lapse of time i.e. in the year 2002, cannot be held to be the

proper exercise of the powers. In short, impugned order of detention requires to be quashed and set aside.

9. For the reasons aforesaid, this petition is allowed. Impugned order of detention dated 21.3.2002 passed by the ld. District Magistrate, Bhavnagar, is hereby quashed and set aside and detenu is hereby ordered to be set at liberty forthwith if he is not required to be detained in any other case. Rule is made absolute.

Direct Service is permitted.

30-7-2002 [ C. K.BUCH, J]
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